NO. 79978-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Marriage of:

MICHAEL STEVEN KING, Respondent,

v.

BRENDA LEONE KING, Appellant,

and

STATE OF WASHINGTON, Involved Party.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF COUNTIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

CONSTITUTIONS

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

I. INTEREST OF AMICUS CURIAE

The Washington State Association of Counties ("WSAC") is a non-profit, non-partisan organization that represents Washington's counties before the state legislature, the state executive branch, and regulatory agencies. Although membership is voluntary, WSAC consistently maintains participation from all of Washington's 39 counties.

WSAC is interested in the instant litigation as its members are committed to sustaining the separation of powers enshrined in our state constitution. WSAC is also concerned that its ability to respond to the housing, medical, mental health, hunger, and other needs of county citizens should not be adversely impacted by a diversion of a disproportionate amount of scarce county resources to providing legal services in civil cases when such services are not constitutionally required.

II. ISSUES PRESENTED

1. Whether the state or federal constitution obligate the State to provide counsel at taxpayer expense for indigent private parties to dissolution actions when the parenting or custody of a child is at issue?

2. If there is a constitutional right to counsel in civil matters, whether the State treasury is responsible for paying the fees necessary to secure counsel in these cases?

III. ARGUMENT

A. NEITHER THE FEDERAL CONSTITUTION NOR THE WASHINGTON CONSTITUTION REQUIRE THE APPOINTMENT OF PUBLICLY FUNDED COUNSEL TO ASSIST INDIGENTS IN CIVIL PROCEEDINGS

In keeping with the direction of RAP 10.3(e) to avoid repetition of matters in other briefs, WSAC will supplement, but not repeat the constitutional arguments of the parties. To this end, WSAC will discuss United States Supreme Court precedent dealing with access to courts for prisoners, and this Court's precedent with respect to the availability of public funds for the appointment of counsel and other ancillary services. This discussion will leave no doubt that while Brenda Lee King and her supporters have identified a real need by indigent individuals for attorney assistance in civil matters, the decision of whether and how to fill this need with public funds rests with the legislature, not the courts.

The legislature is not insensitive to these needs.[1] The legislature's concern is demonstrated through the funding it makes available for civil legal aid[2] and through the statutes that authorize the appointment of counsel to

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[1] See RCW 2.53.005 ("The legislature finds that the provision of civil legal aid services to indigent persons is an important component of the state's responsibility to provide for the proper and effective administration of civil and criminal justice.").

[2] This year, the legislature's operating budget appropriates $22,477,000 for fiscal years 2008 and 2009, for civil legal aid. See SHB 1128, § 115 (2007).

assist indigents in pursuing certain actions and in defending certain actions.[3] The legislature, unfortunately, has not been able to provide sufficient funds to satisfy the need.

This shortfall arises because the legislature has a limited amount of funds available and a number of social ills that need to be addressed. The legislature has to determine the relative importance of providing shelter to a homeless person[4], food to a hungry citizen,[5] mental health treatment to an incapacitated citizen[6], or counsel in a civil proceeding. These determinations are ones that is uniquely within the power of the legislature and within their expertise.[7]

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[3]See, e.g., RCW 7.90.070 (appointing counsel to represent the petitioner in a sexual assault protection action if the respondent is represented by counsel); RCW 10.73.150 (appointing counsel to represent some individuals who have been convicted of a crime in discretionary reviews and in collateral attacks); RCW 13.34.090 (counsel to assist parents in dependency actions); RCW 26.09.110 (counsel to represent minor or dependent children with respect to parenting plans).

[4]This year, the legislature's operating budget appropriates $32,327,000 for this biennium for the Washington Housing Trust Account. See SHB 1128, § 127 (2007).

[5]This year, the legislature's operating budget appropriates a $750,000 for fiscal year 2008, and $750,000 for fiscal year 200, for the food emergency assistance program. See SHB 1128, § 127(16) (2007).

[6]This year, the legislature's operating budget appropriates $1,007,622,000 for this biennium for mental health programs. See SHB 1128, § 204 (2007).

[7]See In re Personal Restraint Petition of Woods, 154 Wn.2d 400, 437, 114 P.3d 607 (2005) (Chambers, J., concurring in part and dissenting in part) ("Providing publicly funded counsel for indigent petitioners is uniquely within the power of the legislature."); Dependency of Grove, 127 Wn.2d 221, 228, 897 P.2d 1252 (1995) (because the legislature has the power to tax, the power to appropriate funds, and is answerable to the public for the expenditure of taxes collected, it is for the legislature to prioritize the amount of public funds to be made available to assist litigants in civil cases); Pannell v. Thompson, 91 Wn.2d 591, 599, 589 P.2d 1235 (1979) ("The decision to create a program as well as whether and to what

1. The Federal Constitutional Right of Access to Courts Does Not Require the Appointment of Counsel

No examination of a due process or equal protection right to counsel is complete without an examination of criminal post-conviction cases and prison access to court cases.[8] The Sixth Amendment right to counsel that most people associate with criminal matters, ends with sentencing. From this point forward, the only source of a federal constitutional right to counsel in criminal cases is the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause.

With respect to these two clauses, the Supreme Court has held that a State must provide an indigent defendant with appointed counsel for the prosecution of his or her first direct appeal as a matter of right. Douglas v. California, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963). A contrary rule would result in an unconstitutional line being drawn between rich and poor. Douglas, 83 S. Ct. at 816. The state, however, is not required "to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in

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extent to fund it is strictly a legislative prerogative.").

[8]This Court has recognized this fact, relying upon criminal federal constitutional right to counsel cases in prior Washington cases that have considered, and ultimately rejected, a constitutional right to public resources for indigent persons engaged in civil litigation. See, e.g., Dependency of Grove, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995), citing Ross v. Moffitt, 417 U.S. 600, 606, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974).

the context of the State's appellate process." Ross v. Moffitt, 417 U.S. 600, 612, 616, 41 L. Ed. 2d 341, 94 S. Ct. 2437, 2444-45, 2447 (1974). This is consistent with the understanding that "at least where wealth is involved, the equal protection clause . . . does not require absolute equality or precisely equal advantages." San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278, 1291 (1973).

This means that after the first appeal as a matter of right, an indigent defendant does not have a right under either the Due Process Clause of the Fourteenth Amendment nor the Equal Protection Clause to publicly funded counsel. Pennsylvania v. Finley, 481 U.S. 551, 555, 95 L. Ed. 2d 539, 107 S. Ct. 1990, 1993-94 (1987); Ross v. Moffitt, supra. This rule applies even if the indigent defendant is seeking to preserve his life, rather than merely seeking to gain his liberty. Murray v. Giarratano, 492 U.S. 1, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) (capital case).

An indigent death row inmate who is seeking to collaterally attack his sentence or conviction, must access the courts from behind bars. This incarceration creates special hardships to access that is shared by other inmates who may be involved in family law actions, civil rights actions, and other civil matters. To preserve these incarcerated indigent prisoners' access to courts, the Supreme Court requires prisons and jails to facilitate the preparation and filing of meaningful legal papers. Bounds v. Smith, 430

U.S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977).

Although may of these indigent incarcerated defendants suffer from mental health problems, language barriers, and illiteracy, the Supreme Court has said that the federal constitutional right of access does not require the provision of counsel at public expense. So long as inmates are provided with law libraries, simple forms, or access to individuals with minimal training in the law, their constitutional right to access courts is satisfied. Lewis v. Casey, 518 U.S. 343, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996); Bounds v. Smith, supra.

While no Supreme Court cases requires that the resources made available to indigent inmates to enable them to access the court be extended to non-incarcerated persons, those resources are available to persons such as Brenda King. Almost every county has a law library. RCW 27.24.010. Our state's statutes and court rules are available on line.[9] A significant number of appellate decisions are available for free on the internet.[10] Forms have been developed for many types of civil actions.[11] Many counties have

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[9]The Revised Code of Washington may be accessed at http://apps.leg.wa.gov/rcw/. Court rules may be accessed at http://www.courts.wa.gov/court_rules/.

[10]The Municipal Research and Service Center makes available recent decisions by this Court and the Washington Court of Appeals, and the full text of Washington Reports (1889 to 1939) and Territory Reports (1854 to 1889), at http://www.legalwa.org/.

[11]These forms may be accessed via any internet connection at http://www.courts.wa.gov/forms/. Some of the forms are even available in Spanish. See http://www.metrokc.gov/kcsc/famlaw/spanish.htm.

courthouse facilitators who have some minimal legal training. See GR 27; RCW 26.12.240. Washington, therefore, has preserved Ms. King's constitutional right of access to the courts.

Brenda King, however, is not merely seeking access to the courts. Rather, Ms. King is seeking a declaration that she has a constitutional right to "*litigate effectively* once in court." Lewis, 518 U.S. at 354 (emphasis in the original). As noted by the Supreme Court, when this same right was sought by prison inmates,

> To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires.

Id.

2. Washington Precedents Do Not Support a State Constitutional Right to Publicly Funded Counsel in Civil Matters

The state constitution is no more protective of an indigent civil litigant's right to counsel than is the federal constitution. Thirty years ago, when an individual who has been evicted from public housing sought the expenditure of public funds to assist him in preserving his home, this Court stated that:

> In refusing to accept the United State's Supreme Court's interpretation of constitutional requirements of equal protection, the signers of the plurality opinion [in Carter v. University of Washington, 85 Wn.2d 391, 536 P.2d 618

> (1975)] did not rest their decision upon any significant difference in the language of article 1, section 12. Rather the opinion purports to give effect to an assumed state public policy, more generous to the poor than is that of the nation as a whole, which was read into the constitution, but without reference to any specific language. [Footnote omitted.]
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> The difficulty with this approach is that public policy is a matter to be determined by the people, speaking through their constitution or the legislature. In their constitution, the people adopted one provision which is addressed to a problem of the poor. It provided in article 1, section 17, that there shall be no imprisonment for debt except in the case of absconding debtors. Aside from the implied right to free defense which has been found to exist in criminal cases, the alleviation of other problems occasioned by economic distress was left to the discretion of the legislature. That body has provided for the payment of the costs of the transcript and all costs necessarily incident to a proper consideration or a review, where it has been judicially determined that a party has a constitutional right to review and that he is unable to perfect the review. RCW 2.32.240, RCW 4.88.330. In concluding that the policy of this state dictates that indigents must have free access to the courts in all civil cases having apparent merit, the plurality opinion in Carter v. University of Washington, 85 Wn.2d 391, 536 P.2d 618 (1975), improperly invaded the legislative province.

Housing Authority of King County v. Saylors, 87 Wn.2d 732, 739-741, 557 P.2d 321 (1976).

In all of the briefing before this Court, neither Brenda King nor the public interest groups supporting her position, have identified any specific language in the Washington Constitution that establishes a state public policy of greater generosity to the poor. They identify no amendment to the constitution that would support this Court's retreat from its former

pronouncements. This is not surprising as the only relevant amendment to the Washington Constitution in the intervening years manifests an express repudiation of any constitutional right to counsel. See Const. art. 1, § 35 (Amend. 84), eff. December 7, 1989 ("This provision shall not constitute a basis . . . for providing a victim or the victim's representative with court appointed counsel.").

This Court's assessment of the Washington constitution in Saylors is amply supported by the historical record regarding the expenditure of public funds to assist indigent individuals in accessing the courts. This Court refused to waive filing fees for indigents in early statehood, and decisions subsequently authorizing the waiver of such fees did not rest upon a constitutional right of access to the courts. O'Connor v. Matzdorff, 76 Wn.2d 589, 458 P.2d 154 (1969) (authorizing the waiver of filing fees pursuant to the court's inherent power to suspend its rules in the interest of justice).

This Court has refused to provide personal service of dissolution actions at public expense. See Ashley v. Superior Court for Pierce County, 82 Wn.2d 188, 196-98, 509 P.2d 751 (1973). This Court, contrary to decisions in many other jurisdictions,[12] has refused to provide counsel at

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[12]See Annot. , Right of Indigent Defendant in Paternity Suit to Have Assistance of Counsel at State Expense, 4 A.L.R.4th 363 (1981).

public expense in filiation proceedings. See State v. Walker, 87 Wn.2d 443, 553 P.2d 1093 (1976).

This Court refused to provide full transcripts to indigent criminal defendants until after Supreme Court intervention. Compare State Ex Rel. Marr v. Superior Court, 163 Wash. 459, 1 P.2d 331 (1931) (no state constitutional right to a transcript statutory right vests the trial judge with discretion as to whether any transcript should be prepared), with State v. Atteberry, 87 Wn.2d 556, 554 P.2d 1053 (1976) (relying upon Draper v. Washington, 372 U.S. 487, 9 L. Ed. 2d 899, 83 S. Ct. 774 (1963), to grant a criminal defendant's request for a full transcript). This Court has refused to provide transcripts to indigent litigants in civil appeals absent a statute authorizing the same. See, e.g., Dependency of Grove, 127 Wn.2d 221, 237-240, 897 P.2d 1252 (1995); Housing Authority of King County v. Saylors, supra. Washington courts refuse to provide counsel or other services at public expense to criminal litigants beyond that mandated by the United States Supreme Court. See, e.g., In re Personal Restraint of Markel, 154 Wn.2d 262, 111 P.3d 249 , 254-55 (2005) (denying payment to counsel in a collateral attack); In re Personal Restraint of Lavery, 154 Wn.2d 249, 261, 111 P.3d 837 (2005) (same); In re Personal Restraint Petition of Gentry, 137 Wn.2d 378, 391-92, 972 P.2d 1250 (1999) (finding no constitutional right to the assistance of an expert or investigator in a collateral attack upon a death

sentence); City of Richland v. Kiehl, 87 Wn. App. 418, 942 P.2d 988 (1997) (no constitutional right to counsel for discretionary review); State v. Mills, 85 Wn. App. 285, 932 P.2d 192 (1997) (same).

Finally, this Court, moreover, refused to find a constitutional right to counsel in non-felony matters until the United States Supreme Court mandated the same. See Hendrix v. City of Seattle, 76 Wn.2d 142, 456 P.2d 696 (1969). If the Washington State Constitution was more solicitous of the needs of indigent persons than is the United States Constitution, surely this case and the others cited would have been resolved differently.

Brenda King, nonetheless, requests that this Court overrule its assessment of the reach of Const. art. 1, § 12, as recognized in Saylors. That assessment included an acknowledgment that

> Const. art. 1, § 12, is less liberal than U.S. Const. amend. 14, if a distinction between the two is to be found in the language used, for it expressly authorizes the legislature to impose terms upon the enjoyment of a privilege.

Saylor, 87 Wn.2d at 740, n. 3.[13]

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[13]The Saylors's determination that Const. art. 1, § 12 did not provide greater protection than does the Fourteenth Amendment's equal protection clause is consistent with opinions rendered by prior panels that included a former delegate to the Washington Constitutional Convention. See State v. Vance, 29 Wash. 435, 458, 70 Pac. 34 (1902) ("these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution"). Compare Vance, 29 Wash. at 490 listing Dunbar, J. as a member of the court with B. Rosenow, The Journal of the Washington State Constitutional Convention 1889, at 470 (1962), and C. Sheldon, The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991, at 134-37 (1992). The Vance opinion requires this court to find that State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), factors 1 (textual language), 2 (differences in the text), 3 (constitutional history), and 4 (pre-existing state law), disfavor a finding that the Washington Constitution provides

The distinction in language noted by the Saylor Court is also present in the Oregon State Constitution. Oregon considers its privileges and immunities clause, Const. art. 1, § 20, to be the "'antithesis of the fourteenth amendment in that [it prevents] the enlargement of the rights of some in discrimination against the rights of others, while the fourteenth amendment prevents the curtailments of rights ...'" State v. Clark, 291 Or. 231, 630 P.2d 810, 814 n. 8, cert. denied, 454 U.S. 1084 (1981), quoting State v. Savage, 96 Or. 53, 59, 184 P. 567 (1919), 189 P.2d 427 (1920). This does not necessarily mean, however, that Oregon Const. art. 1, § 20, provides greater protection to an individual than that provided by the Fourteenth amendment. See State v. Freeland, 295 Or. 367, 667 P.2d 509, 512 (1983) (compliance with Const. art. 1, § 20 does not always satisfy the Fourteenth Amendment).

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greater protection than does the Fourteenth Amendment.

Brenda King attempts to defeat this conclusion by claiming that the Washington Constitution must be read in light of the common law and that a statute authorizing the appointment of counsel has existed since the beginnings of our system of justice. See Appellant's Reply Brief, at 15; Brief of Appellant, at 21. The 1495 statute referenced by Ms. King had a variety of shortcomings, at least one of which is fatal to her position as respondent in the dissolution case:

> First, it did not apply to civil defendants. In addition, it did not exempt the pauper from paying court costs. If the pauper lost and could not pay the prevailing party's costs (including attorney's fees), he could be whipped. Also, there was no provision of legal aid for appeals. Finally, the courts required the indigent to produce a certificate signed by two attorneys attesting to the good cause of the suit. [Footnotes omitted.]

L. Swygert, Should Indigent Civil Litigants in the Federal Courts Have a Right to Appointed Counsel?, 39 Wash. and Lee L. Rev. 1267, 1272 (1982).

Despite Oregon's recognition of the semantic and conceptual differences that may exist between the Fourteenth Amendment and Const. art. 1, § 20, the same analysis is generally utilized in determining whether there has been a denial of equal protection of the laws or a grant of a privilege or immunity on terms not equally applicable to all citizens. City of Klamath Falls v. Winters, 289 Or. 747, 619 P.2d 217, 227-28 (1980). Neither constitutional provision requires that a law treat all persons exactly alike, rather they guarantee like treatment to all persons similarly situated. Id. at 228, quoting State v. Pirkey, 203 Or. 697, 281 P.2d 698 (1955). With respect to the assistance of counsel, the Oregon Court of Appeals has determined that Const. art. 1, § 20, does not require the state to furnish counsel to indigents in every case in which persons of means might be able to employ counsel. Ritchie v. Board of Parole, 37 Or. App. 385, 587 P.2d 1036, 1038-39 (1978); accord B. Latzer, State Constitutional Criminal Law § 5:7, at 5-32 to 5-37 (1995) (identifying no Oregon cases that have deviated from the federal cases setting forth the constitutional right to counsel in post-conviction settings).

Brenda King and her supporters attempt to distance themselves from this Court's pronouncement in Saylors, by claiming that Const. art. 1, § 10, contains an implied right to publicly funded counsel in civil cases. Notably, no other jurisdiction has construed their similar constitutional provisions as

establishing such a right. The Connecticut Supreme Court's discussion in Doe v. State, 216 Conn. 85, 579 A.2d 37 (1990), when a class of indigent women sought recovery of their attorneys' fees from the State, is consistent with Washington precedent.

> Any analysis of the question presented, i.e., whether article first, § 10 requires the state to pay the costs of plaintiffs' counsel must begin with the clear language of the constitution itself. Article first, § 10, contained in our Declaration of Rights, provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." This language has remained unchanged since the adoption of the state constitution of 1818.
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> The historical background of article first, § 10 provides a useful framework to address the question presented. That provision, which originated in the Magna Carta, has been adopted in substantially the same form, in the constitutional provisions of most of the states. See, e.g., Florida, Article I, § 21; Missouri, Article I, § 14; Oklahoma, Article 2, § 6; Pennsylvania, Article I, § 11; Wisconsin, Article I, § 9. We may look to the precedents of sister states when construing similar language in our own constitution. E. Peters, "State Constitutional Law: Federalism in the Common Law Tradition," 84 Mich. L. Rev. 583, 585 (1986).
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> Early state court opinions have generally construed the "open courts" provision as prohibiting the state from selling justice by imposing unreasonable charges on the litigants in the courts; Malin v. La Moure County, 27 N.D. 140, 152, 145 N.W. 582 (1914); and as ending the practice by a corrupt judiciary of demanding gratuities for giving or withholding decisions in pending cases. Christianson v. Pioneer Furniture Co., 101 Wis. 343, 347-48, 77 N.W. 174 (1898); 16A Am. Jur. 2d § 613. The provision was "never intended to guarantee the right to litigate entirely without expense to the

> litigants, nor to impose upon the public the entire burden of the expense of maintenance of the courts." In re Lommen v. Minneapolis Gaslight Co., 65 Minn. 196, 208, 68 N.W. 53 (1896). Thus, the imposition of reasonable court fees has been found to pass constitutional challenges under the open courts provision. Lommen v. Minneapolis Gaslight Co., supra, 208-209; In re Lee, supra, 313. [Footnote omitted.]

Doe, 579 A.2d at 43-44.

The Doe Court determined that on the basis of the record before it and the plain meaning of the open courts provision, it was clear that the courts were available to the litigants' access to the courts was not violated by state action. Doe, 579 A.2d at 44. Having concluded that the state did not impede the plaintiffs in their pursuit of constitutionally adequate "access" to the courts, the question that remained to be resolved was whether the state was obligated, pursuant to article first, § 10, to pay the attorneys' fees of indigent persons to ensure they have access to a remedy for a violation of the state constitution. The answer to this question rested upon a number of principles, including a recognition that article first, § 10 did not guarantee that all injured persons will receive full compensation for their injuries. Doe, 579 A.2d at 46.

In concluding that article first, § 10 did not independently create a "right" to attorneys' fees, the Connecticut Supreme Court stated that:

> Although article first, § 10 prohibits the state from placing obstacles in the path of the plaintiffs' quest to gain access to our courts, the state has no affirmative obligation to

> remove obstacles that it did not create. Florida Bar v. Brumbaugh, 355 So.2d 1186, 1192 (Fla. 1978). "The financial circumstances of these plaintiffs, which are the root cause of their inability" to pay for the services of counsel, have not been produced by any action of the state. Savage v. Aronson, 214 Conn. 256, 284, 571 A.2d 696 (1990). While it is unfortunate that the plaintiffs cannot afford to pay their attorneys, it is a problem caused by their indigency and not by anything that the state has done to prevent their access to the courts.
>
> The constitutional right to a remedy for all cognizable injuries does not delegate to the courts the legislative authority to create new rights under the law. . . . We are bound by the command of the text of the constitution. We do not have the authority to require the expenditure of public funds to the prevailing parties in cases where we, based upon our own predilections, might favor an award of attorneys' fees. "This court has never viewed constitutional language as newly descended snow upon which jurists may trace out their individual notions of public policy uninhibited by the history which attended the adoption of the particular phraseology at issue and the intentions of its authors. The faith which democratic societies repose in the written document as a shield against the arbitrary exercise of governmental power would be illusory if those vested with the responsibility for construing and applying disputed provisions were free to stray from the purposes of the originators." Cologne v. Westfarms Associates, 192 Conn. 48, 62, 469 A.2d 1201 (1984).

Doe, 579 A.2d at 47.

This Connecticut Supreme Court's reasoning is consistent with Washington precedent. This Court has noted that decisions resting upon our state constitution should only "be made for well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies." State v. Gunwall, 106 Wn.2d 54, 62-63, 720 P.2d 808

(1986). Those reasons are not present in the instant case.

The plain language of Const. art. 1, § 10 does not require that the state remove all barriers to effective access to the courts. In Washington, like Connecticut, numerous fees were placed upon a citizen's access to the courts. See, e.g., Laws 1909, ch. 151, § 1 (establishing a $5.00 filing fee for appeals to the Washington Supreme Court); Rem. Rev. Stat., § 316 [P. C. § 8488] (1909) (establishing a $12.00 fee for a jury in a civil case); Laws of 1913, ch. 126, p. 386, § 4 (establishing a fee of $1.00 to be assessed against a defendant in a civil case for purposes of funding official court stenographers). None of these fees have been held to violate Const. art. 1, § 10's right of access to the courts. In Washington, like Connecticut, statutes of limitations and other barriers to relief have long existed. If none of these state erected barriers have been found to violate Const. art. 1, § 10, no tenable legal reason exists to find that a failure to remove the non-state created barrier of poverty through the provision of a publicly funded attorney is a violation of Const. art. 1, § 10.

B. ANY CONSTITUTIONAL REQUIREMENT TO PROVIDE COUNSEL TO INDIGENT PERSONS IN CIVIL PROCEEDINGS MUST BE FUNDED BY THE STATE BUDGET

WSAC firmly believes that there is no legal support for the proposition that the Washington State Constitution includes a right to publicly funded counsel in civil cases. If, however, this Court should determine that such a right exists, the cost of providing such counsel must be borne by the state budget.

In determining whether this new expense should initially be borne by the counties or the state, this court looks to which entity traditionally funded these services in the past. See Matter of the Welfare of J.D., 112 Wn.2d 164, 769 P.2d 291 (1989) (reviewing historical sources of funds for appointed counsel and guardian ad litem services in order to determine whether these services should be paid for out of state or county budgets). The history of civil legal aid clearly establishes that the state, not counties have historically paid for such services.

The first statute to establish a method of providing organized civil legal aid was enacted in 1939. See Laws of 1939, ch. 39. This act authorized counties to establish legal aid bureaus to provide lawyers, without compensation, to any indigent person unable to pay a reasonable attorney's fee. RCW 2.50.010; RCW 2.50.040. The act authorized, but did not require,

counties to utilize its resources to fund this service. RCW 2.50.120.

More recently, the legislature declared that

> the provision of civil legal aid services to indigent persons is an important component of the *state's responsibility* to provide for the proper and effective administration of civil and criminal justice. The legislature further finds that *state-funded legal aid services* should be administered by an independent office of civil legal aid located within the judicial branch and subject to formal continuing oversight that includes bipartisan legislative representation. [Emphasis added.]

RCW 2.53.005. In compliance with this statement, the Legislature has appropriated state funds to provide fund civil legal aid services. See, e.g., SHB 1128, § 115 (2007) (operating budget appropriating $22,477,000 for fiscal years 2008 and 2009, for civil legal aid).

This pattern of allowing, but not requiring county governments to expend their funds to pay for legal civil aid, while affirmatively appropriating state funds to pay for legal civil establishes that this expense is one that is most properly borne by the state treasury. A contrary decision, that a county must expend its limited resources to provide legal services to indigent persons who are unable to pay a reasonable attorney's fee to secure representation in non-criminal matters, would create a new program and an increased level of service that is reimbursable under RCW 43.135.060(1).

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the superior court with regard to the first question presented.

Respectfully submitted this 1st day of May, 2007.

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Staff Attorney